

# Second round of written submissions and dissenting opinion

September 22 2016 | Contributed by **Tavernier Tschanz**

## Introduction

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### Dissenting opinion

## Introduction

According to two recent Supreme Court decisions:

- the parties to an arbitration can validly agree to limit the first phase of the proceedings to one round of written submissions. The enforcement of this agreement by the arbitral tribunal does not violate the parties' right to be heard; and
- a dissenting opinion issued by an arbitrator is not part of the arbitral award. It has no legal effect and must not be taken into account by the Supreme Court when deciding a challenge against the award, irrespective of whether the dissenting opinion is formally included in the award.

## Second round of written submissions

In a recently published decision,<sup>(1)</sup> the Supreme Court referred to its well-established line of decisions regarding the parties' right to be heard.<sup>(2)</sup> The following principles should be emphasised:

- the parties' right to respond as it applies in court proceedings does not apply to international and domestic arbitration;
- the parties do not have an absolute right to a second exchange of submissions in international and domestic arbitration proceedings, provided that the claimant can take position on the respondent's conclusions; and
- the parties may waive a specific guarantee of the right to be heard if they are aware of the consequences of such a waiver and if the core of their right to be heard is still preserved.<sup>(3)</sup>

Based on these principles, the Supreme Court found that:

- it could not review the arbitral tribunal's factual finding that the parties had agreed to have only a single round of submissions;
- the agreement had to be recognised because the parties had entered into it knowing their respective case and the consequences of such an agreement; and
- the parties were granted equal opportunity to present their case.<sup>(4)</sup>

The dispute underlying this decision arose out of a share purchase agreement which required the buyer to cause the target to enter into a distribution agreement with another company, following the termination of that distribution agreement by the target. According to the sellers, this termination had led to the termination of the share purchase agreement. After the first round of submissions in the first phase of the proceedings, the sellers requested leave to serve rebuttal submissions. The arbitral tribunal denied the request based on the parties' previous agreement to have only a single round of submissions in the first phase of the proceedings. In the partial award, the arbitral tribunal found that the share purchase agreement was not terminated further to the termination of the

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distribution agreement because the parties had not intended to create a link between the two contracts. The sellers challenged this decision before the Supreme Court, arguing that the arbitral tribunal had violated their right to be heard, among other grounds, by prohibiting them from filing rebuttal submissions. The challenge was rejected.

This decision recalls that a party to a Swiss arbitration should not expect that the timetable of the proceedings set at the outset can easily be changed down the road, even for a claimant that would like to reply to the statement of defence.

### **Dissenting opinion**

In another recently published decision<sup>(5)</sup> the Supreme Court recalled its well-established line of decisions regarding the principle of *iura novit curia* ('the court knows the law') and the inapplicability of this principle to the findings of fact, based on which it rejected the plaintiff's argument that the arbitral tribunal had violated its right to be heard.<sup>(6)</sup>

The Supreme Court also dealt with the nature and consequences of a dissenting opinion, which was extensively referred to by the plaintiff in its challenge. Confirming its practice, the Supreme Court held that such an opinion:

- is not part of the award, irrespective of whether it is formally integrated into the award;
- is an independent opinion, which has no legal effect; and
- therefore, must not be taken into account by the Supreme Court.<sup>(7)</sup>

Similarly, the Supreme Court held that the comments submitted by the president of the tribunal in response to the challenge could not be taken into account because it was not certain that they reflected the majority's opinion.<sup>(8)</sup>

This decision is the latest among a number of Supreme Court decisions relating to a project for the construction, maintenance and operation of a pipeline to conduct Iranian oil from Eilat to Ashkelon in Israel. In 1989 Y started arbitration proceedings against X, claiming almost \$500 million for outstanding invoices for deliveries of oil. After the issuance of an interim award in favour of Y, in 2004 X filed three counterclaims against Y, its parent company Z, and subsidiarily against a third company D. In 2015, after the president of the tribunal died and had to be replaced, a final award was issued by majority and ordered X to make payments to Y and Z for a total exceeding \$1 billion. A dissenting opinion was attached to the award. X challenged the award before the Supreme Court for the alleged violation of its right to be heard. The challenge was rejected.

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### **Endnotes**

(1) Supreme Court, 4A\_342/2015, April 26 2016 (in French).

(2) For further details please see "[Supreme Court partially annuls CAS arbitral award](#)".

(3) Ground 4.1.2.

(4) Ground 4.2.2.2.

(5) Supreme Court, 4A\_322/2015, June 27 2016 (in French).

(6) Ground 4.1.

(7) Ground 2.2.1.

(8) Ground 2.2.2.

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